BEFORE THE HEARING EXAMINER FOR THE CITY OF RENTON

RE: Pasang Sherpa and Hannah Chi Administrative Appeal LUA10-088, VA-A	APPEAL OF VARIANCE DENIAL

Summary

The Appellants appeal the denial of an administrative variance for the conversion of an existing detached structure into an accessory dwelling unit ("ADU"). The denial is sustained.

The Appellants seek the waiver of RMC 4-2-110(B), which limits the area of ADUs to 800 square feet. The Appellants would like to convert an existing detached single-family structure to an ADU with an area of 960 square feet. The Appellants primarily base their appeal on the belief that staff suggested that they apply for the variance and that staff assured approval. The Hearing Examiner does not have the authority to enforce any assurances or direction given by staff. Nor would any such direction or assurances, if true, override the variance criteria adopted by the Renton City Council.

The sole and only relevant consideration in this appeal is whether the proposal meets applicable variance criteria. The proposal fails to meet two of the four variance criteria because the Appellants have at least one reasonable option available to them to comply with RMC 4-2-110(B). The reasonable options are to reduce the size of the ADU or, if staff so interprets, section off 160 square feet of the ADU. The availability of either option means that the Appellants will not suffer undue hardship as required by one of the variance criterion and that the variance is not the minimum necessary to meet the Appellants' objectives as required by a second variance criterion.

Testimony

Din Chi[1] testified that the Appellants have been working with the City since the beginning. They met with them and were given direction to apply for the variance. The staff told them that a variance and conditional use permit would be necessary to authorize the accessory dwelling unit. She wanted to know why the City would suggest they apply for a variance and then conclude the variance should be denied. The initial staff memo noted that staff "may be" supportive of the variance. The Examiner inquired as to what makes the property unique to justify the variance. Ms. Chi responded that the structure for the ADU has been in existence for several years. Demolishing the variance would create adverse environmental impacts. All permits for the construction of the structure were acquired prior to the City's adoption of its current ADU regulations. Initially the plan was to convert the structure to a recreation room. They didn't know they would need a building permit when they removed the garage door and they applied for and acquired a permit as soon as the City advised them of this requirement in 2008. Currently there's a recreation room with a bathroom and two other rooms. The ADU permit will authorize the addition of a kitchen and the use of the facility for a separate dwelling unit. The Appellants did everything they were told in applying for the variance and the only new item was a comment letter from neighbors opposed to the project. The neighbor's comment letter wasn't based upon fact.

Rocale Timmons, Renton planner, testified that ADUs are authorized structures in the Appellants' zoning district. The pre-application memo identifies the permits required for the ADU, which included a variance and conditional use permit. The memo only provided that the variance "may" be approved. Staff at no time guaranteed approval of the variance. Staff just provided assistance in the variance process. The projects did not comply with three of the four variance criteria. The City's ADU requirements do not make any allowances for existing buildings. RMC 4-2-110(b) imposes the maximum 800 square foot area for ADUs.

Paul Duke, neighbor, testified that the access to the ADU is very marginal and that a fence at the entrance has been struck three or four times already. He also noted that it would not be possible for emergency access to the ADU. He clarified that the access problem is from Dayton Street to the ADU located behind the principal residence. He supported denial of the variance.

Gary Newton, neighbor, testified there have been many problems with the subject property. He'd like to see the code followed.

Carmen Newton, adjacent neighbor, testified that the fence that is hit at the access point is a foot within their property line and if the fence were actually up to the property line there would not be sufficient room for a vehicle to access the ADU. She said that people have been living in the structure and that there is a bathroom and kitchen and she doesn't know why people call it a rec

[1] Ms. Chi did not identify how to spell her name and her name cannot be found on any documents of record. Ms. Chi also spoke in tandem with another party who appears to have been Hannah Chi, but the other speaker did not identify herself.

room when people live in it.

In rebuttal, Ms. Timmons noted that the City's fire department looked over the access and found it adequate for emergency access. The driveway width is 12 feet, which is adequate for emergency vehicles. She noted that approving the variance would set a precedent for conversion of over-sized existing structures. Gary Newton clarified that it's unlikely the driveway is 12 feet wide since the separation between the two adjoining homes is 15 feet.

Exhibits

The Appellants' April 10, 2011 "Letter of Appeal" along with seven attached exhibits was admitted at the May 17, 2011 hearing as Exhibit 1. In addition the Appellants' March 9, 2011 reconsideration request is admitted as Exhibit 2 and the City's decision on the request is admitted as Exhibit 3.

Findings of Fact

Procedural:

1. Appellant. The Appellants are Pasang Sherpa and Hannah Chi.

2. Hearing. The Examiner held a hearing on the application at 10:00 am on May 17, 2011, in the City of Renton City Council Chambers.

Substantive:

3. Description of Proposal. The Appellants seek to reverse a staff decision to deny a request for an administrative variance. The Appellants seek a variance to RMC 4-2-110(B), which limits the area of ADUs to 800 square feet. The Appellants seek to convert an existing building that is 960 square feet in area to an ADU. The detached structure is currently a recreation room and bathroom.

The project site is a 12,180 square foot parcel located in the R-8 zoning district on 2105 Dayton Ave NE, just south of NE 22nd St. The site is currently developed with a 1,380 square foot single family residence and a 960 square foot detached structure. The detached structure was built as a garage in 1994. In 2009 the Appellants converted the garage into a recreation area with an office, storage room and bathroom. The detached structure is located behind the principal residence on the southwest corner of the site. The detached structure is accessed by a twelve foot wide driveway that runs along the southern property line.

The Appellants did not initially acquire all permits required for the 2009 conversion, but did so when notified by the City. All required permits were acquired prior to the City's adoption of its current ADU standards. The Appellants seek an ADU permit so that they add a kitchen to the detached structure and occupy it as a separate single family residence.

Staff issued a denial of the variance dated February 23, 2011. A request for reconsideration was filed by the Appellants on March 9, 2011 and the City's decision on the request was issued on March 28, 2011. The Appellants filed their appeal on April 11, 2011.

4. Adverse Impacts. No adverse impacts are associated with the variance request. At the hearing neighbors expressed concern over the vehicular and emergency access to the ADU. In assessing this impact it should be recognized that the variance isn't necessary to authorize the placement of an ADU on the subject property, it is to allow an ADU that exceeds maximum area by 160 square feet. There is nothing to suggest that an increase in 160 square feet would increase the need for vehicular or emergency access to the property. Approval of the variance would not exacerbate access issues, if any. Any access problems associated with the ADU should be addressed in the conditional use permit review.

Conclusions of Law

Procedural:

1. Authority of Hearing Examiner. RMC 4-8-080(G) provides that appeals of administrative variances are heard and ruled upon by the Hearing Examiner in an open record appeal. The Examiner's decision is appealable to the City Council in a closed record appeal.

Substantive:

2. Comprehensive Plan and Zoning Designation. The subject property is designated Residential Single Family (RSF) in the City of Renton Comprehensive Plan and has a Zoning Designation of Residential-8 du/ac (R8).

3. City Assurances/Promises. The Appellants base the bulk of their appeal on the premise that City staff led them to believe that they would acquire a variance if they applied for it. There could easily have been a misunderstanding on this issue between the Appellants and staff, but there is nothing in the record that suggests that the staff did anything more than provide the Appellants with options and then assisted the Appellants in pursuing them. Absent an express assurance that variance approval is guaranteed, it is inherently unreasonable for the Appellants to believe that approval was assured. The variance process would be an entirely pointless exercise if staff could commit themselves to a decision before conducting a review of a complete application and associated public comment.

Even if staff did mislead the Appellants on their chances for variance approval, the Hearing Examiner has no authority to address the issue. The Appellants' assertions that the City lead it to

believe that it would acquire variance approval false within the rubric of "equitable estoppel". Equitable estoppel may apply where an admission, statement, or act has been detrimentally relied on by another party. *See In re Martin*, 154 Wn. App. 252 (2009). Washington courts have ruled that hearing examiners and county councils (by extension this would also apply to city councils) do not have the authority to adjudicate claims of equitable estoppel. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630 (1984).

A reviewing court could consider the claim, but it would also have to find that invoking equitable estoppel is necessary to prevent a manifest injustice and it must not impair the exercise of a governmental function. *In re Martin*, 154 Wn. App. 252 (2009). Allowing staff to circumvent code requirements adopted by the city council by any promises or assurances would most likely be considered to impair the exercise of government authority.

4. Compliance with ADU 800 Square Foot Requirement. In assessing compliance with the variance criteria, an important issue is how difficult it would be for the Appellants to comply with RMC 4-2-110(B) absent a variance. The Examiner finds and concludes that compliance would not constitute an undue hardship. Compliance could be achieved by reducing the size of the ADU or, if staff so interprets, section off 160 square feet so it is not used as living space for the ADU occupants.

In order to comply with RMC 4-2-110(B), the Appellants need only ensure that a maximum of 800 square feet of the existing accessory structure is used for the ADU. The RMC makes it very clear that ADUs can comprise a portion of an existing structure. RMC 4-11-040 defines an accessory dwelling unit as "*an independent subordinate dwelling unit that is located on the same lot, but not within a single family dwelling*." RMC 4-11-040 defines a dwelling unit as "*a structure **or portion of a structure** designed, occupied or intended for occupancy as separate living quarters with cooking, sleeping and sanitary facilities provided for the exclusive use of a single household.*"(emphasis added). As is clear from the definitions, an accessory dwelling unit can be "a portion of a structure". So long as the Appellants only use an 800 square foot portion of the detached structure for their ADU, their ADU qualifies as an 800 square foot ADU.

The interpretation above should be fully consistent with the intent and purpose of the 800 square foot limitation. The City's comprehensive plan does not address ADU area limitations and no other legislative history was supplied to the Examiner, but it is easy to surmise that the area limitation serves the purpose of limiting intensity and aesthetic impacts. Intensity is not affected by the interpretation because the maximum living area is kept the same. Aesthetics would not be affected because the structure already exists and conversion of a portion of the structure to an ADU would only have marginal aesthetic impacts. Indeed the aesthetic impacts of ADUs are much better addressed by placing them within existing structures as opposed to creating entirely new structures for them. Given that Renton limits new ADUs to 50 per year, *see* RMC 4-2-080(7), encouraging ADUs within existing structures as opposed to new ones could significantly reduce the impacts on the visual landscape.

At the hearing staff suggested that in order to satisfy RMC 4-2-110(B) the Appellants' only option would be to reduce the size of the existing detached structure. Given the discussion above, it

appears that compliance could also be achieved by some physical separation to provide reasonable assurance that the sectioned-off space won't be used by the ADU occupants as soon as the occupancy permits are issued and the doors are closed to City inspectors. A storage space for tools and other garden equipment with its own exterior door for the exclusive use of principal residence occupants would be an ideal example. Ultimately, it is staff's call as whether to allow one or both options to achieve compliance. As discussed in the interpretation of "undue hardship" in Conclusion of Law No. 6, either option provides enough development rights to the Appellants to negate a finding of "undue hardship".

In their written materials the Appellants assert that moving an exterior wall with its associated modifications would create adverse environmental impacts. The Appellants have provided no compelling evidence that such impacts would be significant or long lasting, nor could one reasonably come to that conclusion for construction at such a minor scale.

5. Review Criteria. RMC 4-8-110(7) provides that the Hearing Examiner shall give substantial weight to any discretionary decision rendered by City staff in its zoning code. A variance decision qualifies as a discretionary decision subject to substantial weight. The criteria for variance are quoted below in italics and assessed in corresponding conclusions of law.

RMC 4-9-250(B)(5)(a): *That the applicant suffers undue hardship and the variance is necessary because of special circumstances applicable to subject property, including size, shape, topography, location or surroundings of the subject property, and the strict application of the Zoning Code is found to deprive subject property owner of rights and privileges enjoyed by other property owners in the vicinity and under identical zone classification;*

6. Renton sets a fairly high standard for its variance by requiring that the applicant establish "undue hardship". The term has not been construed by Washington State courts, except for one case that essentially concluded that "undue hardship" is a higher standard than "practical difficulties or unnecessary hardship". *See Cooper-George Co. v. City of Spokane,* 3 Wn. App. 416 (1970). In other jurisdictions, the term has been construed as requiring a showing that the zoning ordinance is confiscatory or would effectively destroy the economic utility of the property. *See, e.g., Clapp v. Zoning Bd. of Appeals,* 268 A.2d 919, 921 (1970). One Washington treatise notes that the hardship term is viewed by some commentators as a means of avoiding constitutional invalidation. *Variances,* Washington Practice, Real Estate, Chapter 4(F). It is telling that the "undue hardship" standard is not mandated by state variance requirements, even though those standards are fairly detailed. *See* RCW 35A.63.110(2). Renton has chosen to adopt a zoning standard that is far stricter than the norm.

The Appellants have not shown that the RMC 4-2-110(B) imposes restrictions and/or burdens that satisfy Renton's strict "undue hardship" standard. In fact, even if the Appellants were completely barred from placing an ADU on their property it is unlikely that they could meet the undue hardship criterion. The Appellants already have a reasonable use of their property under constitutional substantive due process and takings principles because they have a single family home of reasonable size on the property. Granting the variance would not be necessary to avoid

constitutional invalidation. Further, since the Appellants already have a single-family home it is unlikely that a complete prohibition of an ADU would be confiscatory or destroy the economic utility of the home. Even under a more flexible interpretation of undue hardship, which would balance burden on the property owner verses public benefit of imposing the regulation[2], the proposal fails to meet the criterion because the Appellants have provided no evidence on the potential costs associated with reducing the size of the ADU or of sectioning of a portion of the building as discussed in Conclusion of Law No. 4. Without any evidence to the contrary, the option(s) available to the Appellants to comply with RMC 4-2-110(B) are not so exorbitant in cost or difficulty as to constitute an undue hardship.

The Examiner does disagree with staff on the point that there are no special circumstances attributable to the subject property, specifically the existing detached structure. Staff determined in the Griffin application, heard on the same day, that the built environment served as a special circumstance of the property. The built environment has been recognized by the Washington courts as a "location or surrounding" justifying a variance. *See Sherwood v. Grant* County, 40 Wn. App. 496 (1985) (proximity of mobile homes and mobile home parks served as special circumstances under "location and surroundings" for variance for mobile home in single family zoning district). The same applies here. The existing detached structure is a special circumstance of the property; more precisely its location and surroundings. If the variance were denied, the Appellant does not have the option of building an ADU somewhere else without removing the detached structure since there's nowhere else to build. In the alternative the Appellant would have to modify the existing detached structure as discussed in Conclusion of Law No. 4. Both of these results are compelled by the fact that the lot is fully built with the principal residence and existing detached structure.

RMC 4-9-250(B)(5)(b): *That the granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which subject property is situated;*

7. As discussed in Finding of Fact No. 4, there are no adverse impacts associated with the proposed variance. The variance would also serve to facilitate the provision of a variety of housing as well as affordable housing, both objectives of the Growth Management Act and the City's comprehensive plan. Given these factors, the proposal cannot be found materially detrimental to the public welfare and there is no evidence that it would be injurious to property in the vicinity or zone.

RMC 4-9-250(B)(5)(c): *That approval shall not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and zone in which the subject property is situated;*

[2] This public/private balancing act is derived from the constitutional substantive due test for validity of ordinances. *Cf, e.g., Bayfield Resources Co. v. Western Washington Growth Management Hearings Board,* 158 Wn.2d 866 (2010).

8. Granting the variance would be a grant of special privilege since it is difficult to conceive of any circumstance where someone would be allowed to exceed 800 square feet for an ADU outside of a valid nonconforming use. There is no evidence to suggest that there are any such ADUs in the vicinity.

RMC 4-9-250(B)(5)(d): *That the approval as determined by the Reviewing Official is a minimum variance that will accomplish the desired purpose.*

9. The desired purpose is to acquire approval for an ADU. As discussed in Conclusion of Law No. 4 no variance is necessary to acquire ADU approval. The criterion is not met.

DECISION

The appeal is denied. The Examiner sustains the staff's denial of the variance application.

DATED this 31st day of May, 2011.

[Signature on file]
Phil A. Olbrechts
City of Renton Hearing Examiner

Appeal Right and Valuation Notices

RMC 4-8-080(G) provides that the decision of the hearing examiner is final subject to closed record appeal to the Renton City Council. RMC 4-8-110(E)(9) requires appeals of the hearing examiner's decision to be filed within fourteen (14) calendar days from the date of the hearing examiner's decision. A request for reconsideration to the hearing e examiner may also be filed within this 14 day appeal period as identified in RMC 4-8-110(E)(9). A new fourteen (14) day appeal period shall commence upon the issuance of the reconsideration. Additional information regarding the appeal process may be obtained from the City Clerk's Office, Renton City Hall – 7th floor, (425) 430-6510.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.